

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTONIO LEYBA,)	No. C 05-01744 JF (PR)
)	
vs.)	ORDER DENYING PETITION FOR
)	WRIT OF HABEAS CORPUS
)	
D.L. RUNNELS, Warden,)	
)	
Respondent.)	
)	

Petitioner, a California prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer and a supporting memorandum of points and authorities addressing the merits of the petition, and Petitioner filed a traverse. Having reviewed the papers and the underlying record, the Court concludes that Petitioner is not entitled to habeas corpus relief and will deny the petition.

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PROCEDURAL BACKGROUND

A Monterey Superior Court jury convicted Petitioner of first degree murder (Cal. Penal Code § 187), shooting at an occupied motor vehicle (Cal. Penal Code § 246), discharging a firearm from a vehicle (Cal. Penal Code § 12034(d)), and three counts of second degree robbery (Cal. Penal Code § 211). Gang, personal use, and arming enhancements also were found to be true pursuant to Cal. Penal Code §§ 186.22(b)(1), 12022.53(c)-(d), 12022(a)(1). On August 2, 2001, Petitioner was sentenced to sixty-six years-to-life in state prison.

Petitioner appealed the judgment. On October 21, 2003, the state appellate court modified the judgment to strike the section 12022.53(c) personal use enhancement, to strike the ten year gang enhancement and to impose the fifteen year minimum parole eligibility of section 186.22, but otherwise affirmed. The state supreme court denied review on January 28, 2004.

Petitioner filed a federal habeas petition in this Court on April 26, 2005, along with a request to hold the petition in abeyance while Petitioner returned to state court to exhaust his state remedies. On May 23, 2005, this Court granted the request for a stay. On April 12, 2006, the state supreme court denied Petitioner's state habeas petition. Petitioner filed the instant amended petition on May 11, 2006, and the matter was reopened.

FACTUAL BACKGROUND

The following facts are taken from the unpublished opinion of the California Court of Appeal¹:

Lugo, [Petitioner] and Richard Islas belonged to Salinas East Market (SEM), a Norteno criminal street gang. On June 4, 2000, they decided to commit a robbery. They planned to rob concert promoters at the rodeo grounds.

¹ People v. Lugo et al., No. H023308, slip op. at 2-5 (Oct. 21, 2003) (Resp't Ex. D(A)).

1 The threesome traveled to the rodeo grounds in a maroon Mitsubishi
2 owned by Lugo's father's [fiancé], Patricia Cabrera. Islas had a .22 caliber
3 handgun in his waistband. [Petitioner] had a .30 caliber sawed off rifle in a
4 suitcase. Lugo had a .40 caliber gun in his waistband. They also brought
5 changes of clothing, a police scanner, gloves and knit caps.

6 After arriving at the rodeo parking lot, they scanned the area for 30-40
7 minutes. About 5:00 pm, they saw the individuals they suspected of having
8 the money. The individuals were entering a large burgundy car. Lugo,
9 [Petitioner] and Islas followed the car to the [Laurel] Inn and then parked
10 their vehicle at a nearby convenience store.

11 Islas and Lugo got out of the car with the beanies, [hoods], gloves and
12 weapons. To facilitate the getaway, [Petitioner] stayed inside the vehicle.
13 After walking down a breezeway, Islas and Lugo paused to pull down their
14 hoods and beanies, and remove their guns.

15 Prisciliano Villanueva had driven the burgundy car to the Laurel Inn.
16 Jaime Narango Munoz, Jose Lara and Don Pepe were passengers. Villanueva
17 had little money with him because he was not going to get paid until he
18 arrived in Los Angeles.

19 When Villanueva exited the burgundy car, Islas put a gun to his back,
20 demanded money, and threatened to kill him. Islas demanded that Villanueva
21 lay on the ground face down. Villanueva complied, and Islas demanded the
22 car keys. Villanueva threw them over his body.

23 At gunpoint, Islas and Lugo ordered Munoz to get the keys and open
24 the car trunk. Munoz complied, and Islas removed two or three duffel bags
25 from the trunk. Lugo chased Lara up some stairs and took Lara's briefcase.

26 Islas and Lugo ran back to the Mitsubishi. [Petitioner] had moved the
27 car closer to the breezeway and had the car doors open. Islas and Lugo got
28 in the car and they drove away. Shortly thereafter, they passed a police car.

Marina Marquez saw two men wearing hoods running from the Laurel
Inn to a car. Finding the situation suspicious, Marquez wrote down the
vehicle license plate number. Marquez later saw a man at a police car. The
man she saw was Munoz, who had driven into the street and stopped the
police. Marquez gave the license plate number to the police.

[Petitioner], Lugo, and Islas heard their license plate number broadcast
over the police scanner. They drove to the apartment of Lugo's cousin, Joe
Montoya, believing they would be safe there. They got out of the car, wiped
away their fingerprints, and took the luggage into the apartment. A search of
the luggage revealed no money. Islas asked where the guns were. They
realized they had left the guns in a briefcase in the parking lot by the car.
Islas was angry that they had left the guns behind. They went back and
brought the guns upstairs.

Islas called his girlfriend, Maria [Higuera], and asked her to pick them
up. [Higuera] was 17 years old and seven months pregnant with Islas's child.
Borrowing her aunt's green Nissan Sentra, [Higuera] picked up the threesome
outside the apartment complex gate. [Petitioner] was carrying the suitcase
with the guns.

1 Islas sat in the passenger seat, Lugo sat behind Islas, and [Petitioner]
2 sat behind Higuera. Lugo, Islas, and [Petitioner] discussed hearing their
3 license plate number broadcast over the police scanner. They discussed being
4 angry that the robberies had not gone as planned. They decided to get
5 something to eat.

6 As they drove down the street, Higuera accidentally got in the left
7 hand turn lane. When they were stopped at the intersection, [Petitioner]
8 pointed out a man in a black Honda. [Petitioner] said the man looked like a
9 "scrap," a derogatory term for a Sureno, a rival gang. After the light
10 changed, and they turned left onto Laurel, [Petitioner] told Higuera to slow
11 down so they could verify the man's identity. [Higuera] slowed down and
12 pulled to the right. The Honda approached on the left. Lugo and [Petitioner]
13 tried to get the man's attention by waving and yelling at him. [Higuera] told
14 them to stop. She pulled up [Petitioner]'s window with an automatic switch.
15 [Petitioner] put the window back down.

16 As the cars approached a red light at the next intersection, they slowed
17 down. [Petitioner] pulled out his .30 caliber rifle and shot at the Honda. Islas
18 told Higuera, "Hey get down," and pulled her down. Several shots were
19 fired. [Petitioner] said, "I got him. Go, go" and stopped firing.

20 The driver of the Honda, Mario Magana, was shot in the head and
21 died. He was a member of the Hebron Street Gang, a Sureno gang and a
22 Norteno gang rival.

23 Lugo and [Petitioner] were charged with first-degree murder, two
24 counts of shooting at an occupied motor vehicle, discharging a firearm at a
25 vehicle, and three counts of second-degree robbery. Gang and personal use
26 enhancements were alleged in connection with the murder, in connection with
27 one count of shooting at an occupied motor vehicle, and in connection with
28 discharging a firearm from a vehicle. A personal use enhancement was
alleged in connection with all robbery counts.

 Lugo was convicted of three counts of robbery. The personal use
enhancements (§ 12022.53, subd. (b)) were found to be true. Lugo was
acquitted of the remaining counts.

 [Petitioner] was convicted of first degree murder, one count of
shooting at an occupied motor vehicle, discharging a firearm from a vehicle,
and convicted of three counts of robbery. In connection with the murder,
shooting at an occupied vehicle, and discharging a firearm from a vehicle, the
gang (§ 186.22, subd. (b)(1)) and personal use enhancements (§ 12022.53,
subds. (c) & (d)) were found true. Arming enhancements were found true as
to the robbery counts. (§ 12022, subd. (a)(1).)

 Lugo was sentenced to 19 years, four months in state prison.
[Petitioner] was sentenced to 66 years to life in state prison.

LEGAL CLAIMS

 Petitioner asserts the following claims for habeas relief: (1) that new evidence
demonstrates Petitioner's actual innocence and fundamentally undercuts the state's

1 case; and (2) that his conviction violates due process because the trial court gave
2 incorrect jury instructions that permitted the jury to convict him based upon
3 uncorroborated accomplice testimony.

4 5 **DISCUSSION**

6 **A. Standard of Review**

7 Because the instant petition was filed after April 24, 1996, it is governed by the
8 Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposes
9 significant restrictions on the scope of federal habeas corpus proceedings. Under
10 AEDPA, a federal court may not grant habeas relief with respect to a state court
11 proceeding unless the state court's ruling was "contrary to, or involved an
12 unreasonable application of, clearly established federal law, as determined by the
13 Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an
14 unreasonable determination of the facts in light of the evidence presented in the State
15 court proceeding." 28 U.S.C. § 2254(d)(2).

16 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the
17 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on
18 a question of law or if the state court decides a case differently than [the] Court has on
19 a set of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362,
20 412-13 (2000). "Under the 'unreasonable application clause,' a federal habeas court
21 may grant the writ if the state court identifies the correct governing legal principle
22 from [the] Court's decisions but unreasonably applies that principle to the facts of the
23 prisoner's case." Id. "[A] federal habeas court may not issue the writ simply because
24 the court concludes in its independent judgment that the relevant state-court decision
25 applied clearly established federal law erroneously or incorrectly. Rather, that
26 application must also be unreasonable." Id. at 411.

27 "[A] federal habeas court making the 'unreasonable application' inquiry should
28 ask whether the state court's application of clearly established federal law was

1 ‘objectively unreasonable.’” Id. at 409. In examining whether the state court decision
 2 was objectively unreasonable, the inquiry may require analysis of the state court’s
 3 method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003).
 4 The “objectively unreasonable” standard does not equate to “clear error” because
 5 “[t]hese two standards . . . are not the same. The gloss of clear error fails to give
 6 proper deference to state courts by conflating error (even clear error) with
 7 unreasonableness.” Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

8 A federal habeas court may grant the writ if it concludes that the state court’s
 9 adjudication of the claim “resulted in a decision that was based on an unreasonable
 10 determination of the facts in light of the evidence presented in the State court
 11 proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any
 12 determination of a factual issue made by a state court unless the Petitioner rebuts the
 13 presumption of correctness by clear and convincing evidence. 28 U.S.C. §
 14 2254(e)(1).

15 **B. Analysis of Legal Claims**

16 1. New Evidence Showing Actual Innocence

17 Petitioner claims that a recent declaration by Carlos Lugo stating that Petitioner
 18 did not shoot the victim is new evidence that demonstrates Petitioner’s actual
 19 innocence and fundamentally undercuts the state’s case. (Pet. at 17.) Lugo and
 20 Petitioner were co-defendants on the murder and robbery charges, and during trial
 21 Lugo asserted his Fifth Amendment privilege not to testify. (Resp’t at 4.) Lugo was
 22 convicted of three counts of robbery but acquitted on the murder charge. (Resp’t Ex.
 23 D(A) at 5.) His declaration contradicts several facts found by the jury, and alleges
 24 that Richard Islas, not Petitioner, fired the fatal shot. (Pet. Ex. B at 2-4.) Respondent
 25 argues that Petitioner’s claim of actual innocence is not cognizable on federal habeas.
 26 (Resp’t at 4.)

27 “Claims of actual innocence based on newly discovered evidence have never
 28 been held to state a ground for federal habeas relief absent an independent

1 constitutional violation occurring in the underlying state criminal proceeding.”
2 Herrera v. Collins, 506 U.S. 390, 400 (1993). In Herrera, the Supreme Court assumed
3 without deciding that “in a capital case a truly persuasive demonstration of ‘actual
4 innocence’ made after trial would render the execution of a defendant
5 unconstitutional, and warrant federal habeas relief if there were no state avenue open
6 to process such a claim.” Id. at 417. The Supreme Court has declined to answer the
7 question left open in Herrera, which is whether freestanding actual innocence claims
8 (i.e., claims in which the petitioner argues that the evidence sufficiently establishes his
9 innocence, irrespective of any constitutional error at trial or sentencing) are possible.
10 See House v. Bell, 547 U.S. 518, 554-555 (2006). The Ninth Circuit has held that a
11 capital habeas petitioner may assert a freestanding actual innocence claim because a
12 majority of the justices in Herrera would have supported such a claim. See Carriger v.
13 Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc). The petitioner's burden in such
14 a case is “extraordinarily high,” and requires a showing that is “truly persuasive.” See
15 id. (quoting Herrera, 506 U.S. at 417). To be entitled to relief, the capital habeas
16 petitioner asserting a freestanding innocence claim must go beyond demonstrating
17 doubt about his guilt, and must affirmatively prove that he is probably innocent. See
18 id.; Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000). Requiring affirmative
19 proof of innocence is appropriate, because when a petitioner makes a freestanding
20 claim of innocence, he is claiming that he is entitled to relief despite a constitutionally
21 valid conviction. See Carriger, 132 F.3d at 476.

22 In District Attorney's Office for Third Judicial Dist. v. Osborne, the Supreme
23 Court assumed without deciding that freestanding actual innocence claims are
24 cognizable in habeas proceedings in both capital and non-capital cases. 129 S.Ct.
25 2308, 2321-22 (2009). Similarly, this Court will assume without deciding that
26 Petitioner may assert a claim based on a federal constitutional right to be released
27 upon proof of actual innocence.

28 Petitioner first raised this claim in his state habeas petition. The state supreme

1 court summarily denied Petitioner's state habeas petition with a citation to In re Clark,
2 which states that "newly discovered evidence is a basis for relief only if it undermines
3 the prosecution's entire case. It is not sufficient that the evidence might have
4 weakened the prosecution case or presented a more difficult question for the judge or
5 jury." In re Clark, 5 Cal.4th 750, 766 (1993).

6 Petitioner has failed to meet the "extraordinarily high" burden of showing
7 actual innocence. Carriger, 132 F.3d at 476. Petitioner has not presented any new
8 evidence, such as a video recording or DNA, that would preclude any possibility of
9 his guilt. While Lugo's statement serves to undercut the evidence presented at trial, it
10 does not affirmatively prove Petitioner's innocence. Id. Even if Lugo had testified at
11 Petitioner's trial, there were two other eyewitnesses whose consistent testimony
12 contradicted Lugo's account of the shooting.

13 Accordingly, the state court's decision to reject this claim was neither contrary
14 to nor an unreasonable application of clearly established federal law, nor was it an
15 unreasonable determination of the facts in light of the evidence presented. See 28
16 U.S.C. § 2254(d).

17 2. Jury Instructions Regarding Accomplice Testimony

18 Petitioner claims that he was denied due process by the trial court's instructions
19 to the jury that allegedly allowed the jury to rely on uncorroborated accomplice
20 testimony to convict him. (Pet. at 22.) The trial court gave instructions that defined
21 an accomplice as "a person who is subject to prosecution for the identical offense
22 charges [*sic*] in Counts One through Seven against the defendant on trial by reason of
23 aiding and abetting..."² (Resp't Ex. D(A) at 5.) Petitioner argues that the seven
24 counts involved two separate incidents, and complicity in either of the two incidents
25 was sufficient to make a witness an accomplice, yet the instruction required the jury to
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27 ² Charges 1-4 related to the murder of Magana, while charges 5-7 related to the
28 robbery at the Laurel Inn. (Resp't Ex. D(A) at 6-7.)

1 find that the witness was potentially subject to prosecution on all seven counts before
 2 the jury could find that the witness was an accomplice. (Pet. at 22.) Since California
 3 law prohibits a conviction based upon the testimony of an accomplice unless it is
 4 corroborated by other evidence,³ Petitioner argues that instructional error allowed the
 5 jury to convict him based solely on uncorroborated accomplice testimony. (*Id.* at 23.)
 6 Respondent argues that Petitioner's claim does not present a federal question. (Resp't
 7 at 9.)

8 To obtain federal collateral relief for errors in the jury charge, a petitioner must
 9 show that the erroneous jury instruction "so infused the trial with unfairness as to deny
 10 due process of law." *Estelle v. McGuire*, 502 U.S. 62, 75 (1991) (quoting *Lisenba v.*
 11 *California*, 314 U.S. 219, 228 (1941)). If the state court disposed of a constitutional
 12 error as harmless under an appropriate standard of review, federal courts must, for
 13 purposes of application of the "unreasonable application" clause of § 2254(d)(1), first
 14 determine whether the state court's harmless error analysis was objectively
 15 unreasonable. *Medina v. Hornung*, 386 F.3d 872, 878 (9th Cir. 2004). If the federal
 16 court determines that the state court's harmless error analysis was objectively
 17 unreasonable, and thus an unreasonable application of clearly established federal law,
 18 the federal court then proceeds to the harmless error analysis under *Brecht v.*
 19 *Abrahamson*, 507 U.S. 619, 637 (1993). *Id.* at 877.

20 The state appellate court concluded that the error in jury instruction was
 21 harmless. (Resp't Ex. D(A) at 6.) First, the court reviewed Petitioner's argument:

22 According to [Petitioner], the instructional error "permitted the jury to
 23 find [Petitioner] guilty as to the first three counts [the murder and related
 24 counts] based on the uncorroborated testimony of two accomplices, in that
 25 the instruction misled the jury into finding that one or both were not
 26 accomplices when in fact they were, thereby permitting the jury to convict
 based on that testimony without corroboration." Specifically, [Petitioner]
 asserts that a properly instructed jury would almost certainly have found
 Islas to have been involved in all counts and "the erroneous instruction
 therefore likely had no impact on the jury's evaluation of his testimony as

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 28 ³ See Cal. Penal Code § 1111.

1 an accomplice.” However, [Petitioner] maintains that Higuera, who was
2 not an accomplice to the robbery counts, could have been considered an
3 accomplice to the murder counts. In [Petitioner]’s view, the instructional
4 error would have prevented the jury from identifying Higuera as an
5 accomplice to the murder counts, and if Higuera was an accomplice to the
6 murder counts, then Higuera could not corroborate the testimony of Islas,
7 since Islas was also an accomplice.
8 (Id.)

9 The court concluded that Petitioner’s argument was flawed because it “assumes
10 the evidence supported a finding that Higuera was an accomplice to the murder
11 counts.” (Id.) Rather, the evidence showed that Higuera was not an accomplice
12 because she did not have the requisite knowledge and intent to commit murder. (Id. at
13 6-7.) The state appellate court determined there was sufficient evidence by which the
14 jury could have found that Higuera was not an accomplice in the murder:

15 In particular, Higuera testified that she had not seen the guns taken out of
16 the briefcase. Higuera testified that she did not know there would be a
17 shooting. When Lugo and [Petitioner] yelled at the driver of the Honda,
18 Higuera told them to stop. Higuera also pulled up [Petitioner]’s car
19 window with an automatic switch.

20 (Id. at 6.)

21 To be liable as an accomplice under California law, the individual must aid,
22 promote, encourage or instigate a crime, knowing of the unlawful purpose and
23 intending to assist in the commission of a crime. See People v. Beeman, 35 Cal.3d
24 547, 560 (1984). The state appellate court found that Higuera lacked the requisite
25 knowledge and intent either of committing, or of facilitating commission of, the
26 offense and therefore was not an accomplice to the murder. (Resp’t Ex. D(A) at 6.)
27 Accordingly, the court found no prejudice resulting from the jury instruction because
28 “there was no risk the instruction wrongly prevented the jury from finding that
Higuera was an accomplice” (Id. at 7.)

Under Chapman v. California, 386 U.S. 18, 24 (1967), habeas relief is not
warranted if any constitutional error is found to be harmless beyond a reasonable
doubt, or harmless under an equivalent state law standard. Although the state
appellate court did not identify Chapman as the “guiding point” of its harmless error

1 analysis, it applied a harmless error standard that comports with federal law. See
2 Medina, 386 F.3d at 878. Because the state appellate court's approach to Petitioner's
3 claim was consistent with the Supreme Court's holding in Chapman, the state court's
4 application of the harmless error analysis was not objectively unreasonable. See id.
5 Furthermore, because the error was harmless, it cannot be said that the jury instruction
6 "so infused the trial with unfairness as to deny due process of law." Estelle, 502 U.S.
7 at 75.

8 Accordingly, the state court's decision to reject this claim was neither contrary
9 to nor an unreasonable application of clearly established federal law, nor was it an
10 unreasonable determination of the facts in light of the evidence presented. See 28
11 U.S.C. § 2254(d).

12 13 CONCLUSION

14 For the reasons set forth above, the Court concludes that Petitioner has failed to
15 show any violation of his federal constitutional rights in the underlying state criminal
16 proceedings. Accordingly, the petition for writ of habeas corpus is DENIED. The
17 Clerk shall enter judgment and close the file.

18 IT IS SO ORDERED.

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20 DATED: 7/30/09

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JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO LEYBA,

Petitioner,

v.

D. L. RUNNELS, Warden,

Respondent.

Case Number: CV05-01744 JF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/5/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Antonio Leyba T-28485
High Desert State Prison
PO Box 33
Susanville, CA 96127

Dated: 8/5/09

Richard W. Wieking, Clerk